IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-252

* * *

ALFONSO RIVERA,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

* * *

Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

* * *

RESPONDENT'S BRIEF

* * *

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Now Comes, John L. Hill, Attorney General of Texas, and files this his response in the above styled and numbered cause pursuant to the request of the Court:

OPINION BELOW

The unreported per curiam opinion of the Texas Court of Criminal Appeals, styled *Alfonso Rivera v. The State of Texas* (No. 52,585, delivered April 13, 1977), appears in Appendix A.

JURISDICTION

Jurisdiction is proper in this court under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

Respondent believes that the sole question presented for review before this Court should be stated as follows:

(1) Did the Court below correctly find no error in the trial judge's refusal to grant a mistrial upon Petitioner's claim that the district attorney had withheld favorable evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendmant of the United States Constitution provides, in part:

> No State shall. . . deprive any person of life, liberty without due process of law. . .

STATEMENT OF THE CASE

This is an appeal from a mandate of affirmance by the Texas Court of Criminal Appeals entered April 13, 1977, in Cause No. 52,585 styled *Alfonso Rivera v. The State of Texas.*

Petitioner was convicted in Webb County, Texas, of the offense of indecency with a child; punishment was assessed by the jury at two and a half years confinement. The judgment of conviction was affirmed on direct appeal by the Texas Court of Criminal Appeals. (See Appendix A). Petitioner then filed this Petition for Certiorari.

REASONS FOR DENYING THE WRIT

The sole issue dispositive of this case is whether the Texas Court of Criminal Appeals correctly found no error in the trial judge's refusal to grant a mistrial upon Petitioner's claim that the district attorney withheld favorable information from defense counsel.

As noted by the court below, Petitioner is complaining of an oral communication to the District Attorney's office by an examining physician stating that the six-year old complainant was not suffering from gonorrhea. Petitioner incorrectly asserts that this case should be controlled by *Brady v. State of Maryland*, 373 U.S. 83 (1963) on the theory that the withholding of that information placed Petitioner at a disadvantage because he was concentrating his defense on the rape count of a two count indictment rather than the indecency with a child count.

Prior to trial, Petitioner filed a motion to elect, and the State subsequently prosecuted Petitioner for the offense of indecency with a child. As the court below correctly noted, Petitioner was not contending that the physician's statement was material to the charge of indecency with a child; instead Petitoner focuses on his alleged difficulty in preparing a rape defense without the doctor's report. The Texas Court of Criminal Appeals correctly rejected this claim by finding: "whether the complainant did or did not have gonorrhea was not material to the charge of indecency with a child, and in any reasonable likelihood the evidence, if admissible at all, could not have affected the outcome of the trial."

Petitioner erroneously has equated the physician's testimony that the six year old complainant was not

suffering from gonorrhea with Petitioner's supposed exoneration of the rape charge. Using this faulty reasoning, Petitioner accuses the state's attorney of leading the community to believe that the complainant had been raped while he allegedly knew that there was no evidence of rape. It is Petitioner's premise that this action by the prosecutor evidences a consistent disregard for Petitioner's rights in violation of the Fourteenth Amendment and mandates reversal since the doctor's conversation exonerated him from the charge of rape. As noted by the Court below, such a conversation with the examining doctor would not have affected the outcome of the trial on a charge of indecency with a child. Futhermore, although not directly stated by the Texas Court of Criminal Appeals, evidence showing that the complainant is not suffering from a venereal disease falls far short of establishing that no rape of a child was commited. Therefore, contrary to Petitioner's allegations, the record supports no finding that the District Attorney withheld information from Petitioner that no rape had been committed.

CONCLUSION

The District Attorney did not withhold favorable evidence from the Petitioner in violation of *Brady*, supra. Therefore, the action of the Texas Court of Criminal Appeals in affirming Petitioner's conviction was proper.

Respectfully submitted,

JOHN L. HILL
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PROOF OF SERVICE

I, Joe B. Dibrell, Jr., an Assistant Attorney General and a member of the Bar of the Supreme Court of the United States now enter my appearance in this cause on behalf of Respondent Estelle, and do hereby certify that three (3) copies of the foregoing Respondent's Brief have been served on Petitioner by placing same in the United States Mail, first class, postage prepaid, certified, return receipt requested on this the _____ day of November, 1977, addressed as follows: Roger Rocha, P.O. Box 62, Laredo, Texas 78040.

JOE B. DIBRELL, JR.
Assistant Attorney General

A P P E N D I X

NO. 52,585

ALFONSO RIVERA, APPELLANT	)	
	)	APPEAL, FROM
VS.	)	WEBB COUNTY
THE STATE OF TEXAS, APPELLEE	)	

OPINION

Appellant was charged in a two-count indictment with the offenses of rape and indecency with a child. Pursuant to appellant's motion to elect, the State prosecuted the offense of indecency with a child for which appellant was convicted. His punishment was fixed by the jury at confinement for two and one-half years.

The six-year old complainant testified that appellant touched her private parts with his finger and his private part. The court ruled that the six-year old was competent to testify after she had responded "Yes" to the court's inquiries whether she knows that she has to tell the truth, that if she did not tell the truth she will get punished, that there is a God, that God wants her to tell the truth, that if she does not tell the truth God will punish her, and that she does want to tell the truth.

Appellant challenges, by his first ground of error, the court's ruling. The gravamen of the challenge is that the court did not ask the witness if she knew the meaning of the oath or ask enough questions to test her competency. We perceive no error.

The question of the competency of a witness is for

determination by the trial court, and its ruling thereon will not be disturbed unless an abuse of discretion is shown. In considering whether an abuse of discretion is shown in admitting a child's testimony, a review of the child's entire testimony is made to ascertain the question of competency. *Fields v. State*, 500 S.W. 2d 500, 502-03 (Tex. Cr. App. 1973).

The fact that the witness was not asked about the oath is not controlling; more important is that she knew she had to tell the truth and that she would be punished if she did not do so. See Fields v. State, *supra*, at 502. Her entire testimony reveals that she possessed sufficient intellect to relate, with reasonable clarity for her age, tha matter about which she was interrogated, and appellant does not contend that there are any inconsistencies in her account of the occurrence. We, therefore, cannot say that the trial court abused its discretion in ruling that she was a competent witness. The first ground is overruled.

Next, appellant complains of the res gestae admission of the child s statements reported by her mother. The premise for appellant's argument is that it is a logical conclusion that the statements were made from eight to ten hours following the incident and therefore they were not spontaneous. The record refutes the premise.

The child acknowledged that on the day the indecency occurred she ran home and told her mother about it. The mother, called as a witness by appellant, stated that on that day when she noticed the child had some spots on her panties, she questioned her about what happened, "(n)ot right away" but "after a little while" when she found something unusual, abnormal about her private parts. Thereafter, on cross-

examination, the State elicited the statements.*

The time elasping between the event and the statements is not alone determinative; the deciding factor is spontaneity. *Williams v. State*, 145 Tex. Cr. R. 536, 170 SW. 2d 482, 490 (1943). Here, when she was first asked, the young child told her mother what had happened. In *Heflin v. State*, 161 Tex. Cr. R. 41, 274 S.W. 2d 681, 683-84 (1955), the child's statements made after a greater lapse of time and following more persistent questioning by the mother than is recorded here, were admitted under the res gestae rule. The second ground is overruled.

The third and final ground is that the court erred in overruling appellant's motion for mistrial when appellant claimed the district attorney had withheld evidence favorable to the defense. Although appellant does not specify the evidence, it appears to be the oral communication Dr. Ezequiel D. Salinas, Jr., made to the district attorney's office to the effect that the six-year old complainant was not suffering from gonorrhea. Reliance is had upon *Brady v. State of Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Ridyolph v. State*, 503 S.W. 2d 276 (Tex. Cr. App., 1973). Those cases make it clear that it is reversible error if the prosecutor actively suppresses evidence which *may*

*We will assume; without deciding, that appeallant did not invite the cross-examination and that his objection was timely. While the mother was testifying as appellant's witness, she was asked "the child came and told you that Poncho Rivera had been bothering her?" A sustained objection to the leading nature of the question forestalled the answer. Subsequently, the mother testified on two statements made by the child before appellant interposed any objection.

exhonerate the accused or be of material importance to the defense. Consistent therewith, those cases require as a predicate for reversal a finding of the materiality of the evidence, and the standard to be applied is, as noted in *Crutcher v. State*, 481 S.W. 2d 113, 116 (Tex. Cr. App., 1972), whether the evidence "may have had an effect on the outcome of the trial."

Appellant does not contend that the information was material to the charge of indecency with a child for which he was tried and convicted; rather, his complaint is that the withholding of the information placed him at a disadvantage in preparing a defense to the first count of rape in the indictment. Whether the complainant did or did not have gonorrhea was not material to the charge of indecency with a child, and in any reasonable likelihood the evidence, if admissable at all, could not have affected the outcome of the trial. The last ground is overruled.

No reversible error is shown. The judgment is affirmed.

PER CURIAM

(Delivered April 13, 1977)